July 27, 2018

**Ex Parte**

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

RE: Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84

Dear Ms. Dortch:

On Thursday, July 26, 2018, Jonathan Spalter, Jon Banks and I (all of USTelecom) met with Commissioner Brendan Carr and his Chief of Staff, Jamie Susskind, to discuss the above-referenced proceeding.[1] During our meeting we emphasized our shared goals with the Federal Communications Commission (Commission) of increasing broadband availability and competition in the provision of high-speed services by moving forward with the draft order's proposal to create a presumption that ILECs are entitled to competitively neutral rates when attaching to investor-owned utility (IOU) poles. The Commission has adopted this approach in previous pole actions and has been upheld on appeal, as discussed below.

We expressed concerns, however, that while the draft order would adopt the modified telecommunications rate as the presumptively "just and reasonable rate" for ILEC attachers,[2] it would do so only for "newly-negotiated pole attachment agreements" between ILEC attachers and electric utilities.[3] We explained that such an approach was too narrow, and would not attain the Commission's stated goal of "accelerat[ing] the deployment of next-generation infrastructure so that consumers in all regions of the Nation can enjoy the benefits of high-speed Internet access as well as additional competition."[4] For example, no matter how wrong

[1] Notice of Proposed Rulemaking, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (released April 21, 2017) (*Notice*).

[2] Third Report and Order and Declaratory Ruling, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, FCC-CIRC1808-03, ¶ 117 (released July 12, 2018) (*Draft Order*).

[3] *Id.*, ¶ 114.

[4] *Notice*, ¶ 5.

the IOU was regarding any (long since passed) purported benefits of an existing joint-use agreement, the IOU would now have every incentive to let these agreements – in many cases thirty, forty, fifty years old and greater – languish in "evergreen" status at unreasonable rates, entirely refusing to renegotiate. Indeed, some of our members have experienced such tactics in the past.[5] Under such conditions, litigation would be considerably more likely, not less.

We explained that ILECs have no leverage to get IOUs to the bargaining table to negotiate a new agreement.[6] For instance, the Enforcement Bureau's 2017 *Dominion* decision found that the ILEC "'genuinely lack[ed] the ability to terminate' the agreements,'" and USTelecom has every reason to believe that the *Dominion* situation is generally representative of ILEC agreements.[7] As a practical matter, ILECs cannot threaten removal of electric facilities because doing so would create a public safety hazard, and traditionally, joint use agreements do not allow for ILECs to remove electric facilities from poles. At the same time, unlike other attachers, ILECs have no right of attachment,[8] so if ILECs refuse to pay unreasonable rates under "evergreen" contracts, IOUs can prevent ILECs from any new build opportunities such as new subdivisions and fiber-to-the-cell 5G deployments. Given these uneven negotiating postures, ILECs have no way to get IOUs to the negotiating table if IOUs refuse to negotiate, as would be the case if the modified telecom rate presumption applies to only new agreements.

We also explained the lack of any meaningful benefits associated with joint use agreements and the extensive record in the proceeding showing that there are no such benefits.[9] As USTelecom explained at length in its June 6, 2018 *ex parte*, any benefits, whether

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[5] *See* Ex Parte Notice, from Roy Litland, Verizon, to Marlene Dortch, Federal Communications Commission, WC Docket No. 17-84, p. 3 (submitted July 26, 2018) (*Verizon Ex Parte*).

[6] *Id.*, pp. 2 – 6.

[7] *See*, *Verizon Virginia, LLC and Verizon South, Inc. v. Virginia Electric and Power Company d/b/a/ Dominion Virginia Power*, Order, 32 FCC Rcd 3750 ¶ 14 (2017) (*Verizon v. Dominion Power*). *See also* Order, *Verizon Florida LLC v. Florida Power and Light Company*, 30 FCC Rcd 1140, ¶ 25, (2015) (*Florida Power and Light Order*) (stating "this appears to be a case in which 'an incumbent LEC . . . genuinely lacks the ability to terminate an existing agreement") (citation omitted, alteration in original).

[8] *See* 47 U.S.C. § 224.

[9] *See, e.g.*, Ex Parte Notice, from Kevin G. Rupy, USTelecom, to Marlene Dortch, Federal Communications Commission, WC Docket No. 17-84 at 4-7 (submitted June 6, 2018) (*USTelecom June 6th Ex Parte*). Ex Parte Letter from Frank Simone, AT&T, to Marlene Dortch, FCC, WC Docket No. 17-84, at 4 (July 23, 2018) (*AT&T Ex Parte*) (explaining that "[b]ecause joint use agreements were negotiated decades ago, many of the terms perceived as beneficial are in fact not"). *Verizon Ex Parte*, at 4-6 (July 26, 2018) (explaining that Verizon "ha[s] not yet identified an existing agreement that provides us a net material advantage over competitors as the power companies claim").

financial or operational, are virtually non-existent, just as the Enforcement Bureau found in *Dominion*.[10] Further, to the extent there were ever such benefits, they accrued at the time of attachment, which in the vast majority of cases was generations ago (and at a time when ILECs were still rate-of-return regulated). Indeed, in the most recent case addressing the issue, the Enforcement Bureau found the IOU's claims regarding any such benefits were "overstated," and that the IOU's response to the complaint did not "quantify the purported material advantages" received by the ILEC.[11]

This underscore the findings of USTelecom's November 2017 survey (USTelecom Analysis)[12] which showed that pole attachment rates paid by ILECs to IOUs have not declined despite the Commission's expectations in its 2011 Pole Attachment Order.[13] In contrast, pole attachment rates ILECs charge cable and competitive local exchange carriers (CLECs) with whom ILECs compete have decreased. Thus, the "wide disparity in pole rental rates," that the Commission recognized as a barrier to broadband deployment in 2011,[14] has in fact widened. The survey also showed a significant difference in the ratio between the number of IOU poles to which ILECs attach and the number of ILEC poles to which IOUs attach, thereby creating an environment whereby "bargaining power is heavily skewed to the IOUs."[15]

USTelecom therefore proposed that the Commission conclude that the modified telecom rate should be the presumptive just and reasonable rate for ILEC attachers in all agreements. If an incumbent LEC were to file a complaint, an IOU could still overcome the presumption and justify a higher rate by showing that the net benefits, if any, an ILEC receives "far outstrip the benefits accorded to other pole attachers."[16] If the Commission decides to apply the telecom rate presumption to only new agreements, the Commission should make clear that the term "new agreement" applies to agreements that, following the effective date of the order, are renewed (including auto-renewed), extended, placed in evergreen status by the action of either party, or for which a party invokes a contractual renegotiation provision.

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[10] *See USTelecom June 6th Ex Parte* at 4 – 7.

[11] *See Verizon v. Dominion Power* ¶¶ 18, 20, 22; *see also* Letter from Kevin G. Rupy, USTelecom, to Marlene Dortch, Docket No. 17-84 at 2 (Dec. 8, 2017).

[12] *See*, Ex Parte Notice, from Kevin G. Rupy, USTelecom, to Marlene Dortch, Federal Communications Commission, WC Docket No. 17-84 (submitted November 21, 2017) (*USTelecom Analysis*).

[13] Report and Order and Order on Reconsideration, *Implementation of Section 224 of the Act*, 26 FCC Rcd. 5240, 76 FR 40817, FCC 11-50, (released April 7, 2011) (*2011 Pole Attachment Order*).

[14] *Id.*, ¶ 3.

[15] *USTelecom Analysis*, p. 7.

[16] *See, e.g.*, *Notice* ¶ 45.

Any narrower definition could create an improper incentive for power companies to try to lock in existing inflated rates by refusing to renegotiate them, even in the event of termination.

As recently noted by AT&T, the current draft order could "leave ILECs in a virtual no-man's land," since ILECs have no mandatory right of pole access under Section 224. Moreover, absent the presumption, IOUs would not need to enter into new agreements with ILECs and would have no incentive to do so when it would mean lower rates.[17] Extending the modified telecom rate presumption to all agreements, coupled with the right to refunds for overpayments as far back as the statute of limitations allows, would provide additional guidance to the industry and the appropriate incentive for IOUs to negotiate rate reductions that are consistent with the Act and the Commission's objective of removing rate disparities and promoting broadband deployment.

We also discussed the integral role that reforms to pole attachment rates could play in the deployment of 5G networks. As Chairman Ajit Pai stated this week in testimony before Congress, the Commission can "make all of the spectrum in the world available for 5G service, but it won't make a difference if the physical infrastructure isn't in place to carry this traffic."[18] He further emphasized the importance of promoting "the deployment of wireline infrastructure, which is essential to carry the massive amounts of 5G traffic that we anticipate."[19]

USTelecom agrees, and our member companies are aggressively deploying fiber networks to achieve this goal. However, they are at an increasing competitive disadvantage due to the significant disparity in pole attachment rates as evidenced in the USTelecom Analysis.[20] Moreover, deployment timelines are hindered due to protracted negotiation disputes (that can often prevent ILECs from deploying new facilities until an agreement is reached with the IOU), and subsequent, lengthy complaint proceedings. By adopting this approach, the Commission can avoid such unnecessary delays, and best achieve its goal of ensuring the deployment of the infrastructure necessary for 5G by introducing greater balance to the negotiation process between IOUs and ILECs during pole attachment negotiations.

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[17] *See*, *AT&T Ex Parte*, p. 4.

[18] Statement of Chairman Ajit Pai, Federal Communications Commission, Hearing on "Oversight of the Federal Communications Commission" Before the Subcommittee on Communications and Technology of the United States House of Representatives Committee on Energy and Commerce, July 25, 2018 (available at: https://docs.fcc.gov/public/attachments/DOC-352944A1.pdf) (visited July 26, 2018).

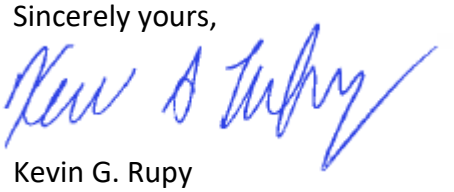
[19] *Id*.

[20] *See*, *USTelecom Analysis*.

Moreover, adopting this approach would not raise concerns regarding contractual issues. The Commission's Enforcement Bureau has previously concluded that making a showing that prospectively applying a just and reasonable rate is arbitrary and capricious is a "heavy burden."[21] It further noted that "the Commission has applied a new rate to existing pole attachments on many occasions and has been upheld on appeal."[22]

Please contact the undersigned should you have any questions.

Sincerely yours,



Kevin G. Rupy
Vice President, Law & Policy

cc: Commissioner Brendan Carr
Jamie Susskind

[21] *See*, *Florida Power and Light Order*, ¶ 18.

[22] *Id.*, n. 61.